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6  
7 **UNITED STATES DISTRICT COURT**  
8 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
9 **EASTERN DIVISION**

10 **LEVI CHIN and TERESA**  
11 **PRECIADO**, on behalf of themselves,  
12 and all others similarly situated,

13 Plaintiffs,

14 v.

15 **EVERGREEN FREEDOM**  
16 **FOUNDATION,**

17 Defendant.

Case No.: 5:24-cv-01473-KK-SHK

**NOTICE OF MOTION AND**  
**MOTION TO DISMISS**  
**PLAINTIFFS' COMPLAINT**  
**PURSUANT TO CAL. CODE CIV.**  
**PROC. § 425.16 (ANTI-SLAPP)**

Hearing Date: December 12, 2024  
Time: 9:30 a.m.  
Judge: Hon. Kenly K. Kato  
Place: 3470 12th Street 3rd Floor,  
Courtroom: 3, Riverside, CA 92501

Action Filed: July 15, 2024  
First Am. Compl. Filed: August 9,  
2024

19  
20 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

21 PLEASE TAKE NOTICE that on Thursday, December 12, 2024 at 9:30 a.m.,  
22 or as soon thereafter as this matter may be heard in Courtroom 3, of the above-  
23 entitled court, located at 3470 12th Street, 3rd Floor, Courtroom 3, Riverside, CA

24 Mot. to Dismiss Pursuant to  
Cal. Code Civ. Proc. § 425.16

1 92501, defendant Evergreen Freedom Foundation (“Foundation” of “Defendant”)  
2 will and hereby does move this Court, pursuant to California Code of Civil  
3 Procedure § 425.16, for an order dismissing the Complaint brought by Plaintiffs Levi  
4 Chin and Teresa Preciado on behalf of themselves, and all other similarly situated  
5 (“Plaintiffs”), in its entirety, with prejudice.

6 Plaintiffs’ Complaint, and cause of action, arises directly from the Freedom  
7 Foundation’s efforts to inform public employees of their First Amendment rights.  
8 To do so, the Foundation sent an email and mailer to certain public employees asking  
9 them their opinions on Teamsters, Local 1932 and informing them that they have  
10 constitutional rights regarding union membership. Because all of Plaintiffs’ claims  
11 are based on the Foundation’s free speech and its conduct in furtherance of the  
12 exercise of free speech in connection with matters of public interest, they fall within  
13 the broad scope of California Code of Civil Procedure § 425.16 (“anti-SLAPP”). *See*  
14 Memorandum of Points and Authorities, Section IV. Consequently, the burden shifts  
15 to the Plaintiffs to establish a probability that he will prevail on each of his claims.  
16 *See* C.C.P. § 425.16(6)(1); Memorandum, Section III.

17 1. Plaintiffs’ First Cause of Action for violation(s) of the California Anti-  
18 Spam Law should be dismissed for each of the following reasons:

- 19 a. The April 25, 2024 email is a communication made in furtherance of  
20 the Foundation’s exercise of its free speech rights.  
21 b. The April 25, 2024 email’s subject line is not misleading.  
22 c. Plaintiffs did not properly plead that the April 25, 2024 email is a  
23 commercial email advertisement, nor can it properly be pled as one.

1 This Motion is based on the Notice; Memorandum of Points and Authorities;  
2 and attached Declarations of Orlando Ibarra and Shella Alcabes; on any other  
3 matters of which this Court may take judicial notice; on all pleadings, files and  
4 records in this action; and on such argument as may be received by this Court at the  
5 hearing on this Motion.

6 This Motion is made following the conference of counsel pursuant to Local  
7 Rule 7-3, which took place September 27, 2024, during which Plaintiffs' counsel did  
8 not participate in good faith. *See*, Alcabes Decl. ¶ 3.

9 For all reasons stated, the Foundation respectfully requests that this Court  
10 strike Plaintiffs' First Cause of Action in its entirety, with prejudice, and further  
11 requests this Court to find that the Foundation is entitled to recover its reasonable  
12 attorneys' fees and costs incurred in defending against Plaintiffs' meritless claims.<sup>1</sup>

13 Dated: October 22, 2024

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22 <sup>1</sup> The SLAPP statute mandates that a prevailing party on a SLAPP motion "shall"  
23 recover attorneys' fees and costs. C.C.P. § 425.16(c). If the Court grants this Motion,  
24 Defendant will file a separate noticed motion to recover the fees and costs that is has  
incurred in connection with its SLAPP Motion. *E.g.*, *Ketchum v. Moses*, 24 Cal.4th  
1122, 1131-1132 (2001); *Thomas v. Fry's Electronics, Inc.*, 400 F.3d 1206, 1209  
(9th Cir. 2005) ("California anti-SLAPP motions to strike and entitlement to fees  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

This action arises entirely from the Freedom Foundation’s (“Foundation”) efforts to inform public employees of their First Amendment rights. To do so, the Foundation sent an email to several public employees asking them their opinions on their local union, Teamsters Local 1932, and informing them that they have constitutional rights regarding union membership. This knowledge helps the Foundation contact those employees that want to opt out of Teamsters Local 1932 membership and avoid contacting those that are happy with their union. Bush Gottlieb, a law firm that often defends public sector unions against constitutional claims made by public employees,<sup>2</sup> brought this suit in order to silence the Foundation from speaking to public employees about their rights.

Plaintiffs’ argument centers around the following allegation: the Foundation sent an email that violates California Business and Professions Code § 17529.5(a)(3) (“Section 17529.5”) because (1) the subject line would mislead a reasonable person about whom the email is from and (2) because the subject line is misrepresentative of a material fact regarding the contents or subject matter of the email. However, Plaintiffs fail to properly allege why a reasonable person would assume when reading the subject line and email that it came from Teamsters. Plaintiffs also fail to allege what else, if anything, is misleading about the subject line. Even a cursory

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<sup>2</sup> The top quote on the Bush Gottlieb website reads: “For decades we have represented private and public sector unions.” <https://bushgottlieb.com/> (last visited September 19, 2024).



1 review of the email itself makes it abundantly clear that the subject line does not  
2 mislead the reader about either the identity of the sender or the content of the email.  
3 Lastly, Plaintiffs fail to allege the remaining elements of a Section 17529 cause of  
4 action.

5 For all of these reasons, the Foundation respectfully requests that this Court  
6 grant the Foundation's Motion, and strike and dismiss Plaintiffs' claim with  
7 prejudice.

## 8 II. STATEMENT OF FACTS

9 Evergreen Freedom Foundation (the "Foundation") is a non-profit  
10 organization engaged in informing public employees of the First Amendment rights  
11 regarding union membership, especially as these rights have changed since the 2018  
12 *Janus v. AFSCME* Supreme Court decision.<sup>3</sup> Declaration of Orlando Ibarra ("Ibarra  
13 Decl.") ¶ 3. The Foundation did so by emailing several public employees who are  
14 members of Teamsters Local 1932 to ask about their experience as members of that  
15 union and informing them about their constitutional rights relating to union  
16 membership. *Id.* at ¶ 4. By finding out public employees' opinion on Teamsters  
17 Local 1932, the Foundation learns which public employees to later contact regarding  
18 their First Amendment rights regarding union members, and avoid sending emails  
19 to those who are happy with their union. *Id.* at ¶ 5.

20 The First Amended Complaint ("FAC") alleges that on April 25, 2024,  
21 Plaintiffs, who are both public employees and members of Teamsters, Local 1932,

22  
23 <sup>3</sup> *Janus v. Am. Fed'n. of State, Cnty., and Mun. Emps., Council 31*, 585 U.S. 878  
(2018)

1 received an email at their public employment email addresses from  
2 orlando@optouttoday.com (the “April 25, 2024 Email”). FAC, ¶ 14. The sender’s  
3 email is not obscured in any way, stating it is “From: Orlando Ibarra  
4 <orlando@optouttoday.com>” at the top of the email. FAC, Ex. A. Immediately  
5 below that, the subject line states: “Subject: **Your Experience with Teamsters –**  
6 **Your Voice Matters.**” *Id.* (emphasis added). These particular emails included  
7 notices that the email originated outside of the organization and that the recipient  
8 does not often get emails from orlando@optouttoday.com. *Id.*

9 The FAC alleges that the April 25, 2024 Email violates California Business  
10 & Professions Code § 17529.5(a)(3) (“Section 17529”) because the subject line  
11 “appeared on its face to be endorsed or solicited by Teamsters” while the email itself  
12 “actually intended to advertise the Defendant’ [sic] website services in providing  
13 instructions and forms for the union member to opt-out of their membership with  
14 Teamsters.” FAC, ¶ 47. Additionally, the FAC alleges that the “subject line of the  
15 emails at issue contained a subject line that was both misrepresentative of the context  
16 of the emails’ substance and misleading about a material fact regarding the contents  
17 or subject matter of the message under California Anti-Spam Law.” FAC, ¶ 46.

18 The body of the email is as follows:

19 Dear ,

20 I'll be quick and to the point.

21 The reason why I am reaching out is because several former Teamsters 1932  
22 members have reached out to us asking for help to stop paying dues into what they  
23 say is a union that does not really represent them. While they just might be

1 disgruntled members, it is important to highlight that they chose to exercise their  
2 constitutional right to do so.

3 We here at OptOutToday.com are dedicated to informing and empowering those that  
4 are disenfranchised by their union. When a union, or any service for that matter, does  
5 not benefit you, why should you then have to cough up your hard-earned paycheck  
6 to them? Thanks to the Janus decision in 2018, you no longer have to and you have  
7 the right to stay in or leave your public sector union.

8 We are genuinely interested in hearing your side of the story. So, to those that have  
9 decided to opt out - what made you leave? Are there things that Teamsters could  
10 have done better? Ideally, what are the top 2 things you would like to see change.  
11 On the flip side, to those that are still full dues paying members - why do you think  
12 some of your coworkers have left? Are you aware of your right to opt out of dues  
13 and save you money? What are somethings that Teamsters 1932 has done well?

14 If you're open to sharing your thoughts, we'd love to hear from you. Your feedback  
15 is not only important to us but could also be pivotal for many of your peers  
16 contemplating similar decisions.

17 Please feel free to reach out to us at your convenience or visit OptOutToday.com to  
18 know how you can opt out and start saving hundreds per year.

19 Best,

20 Orlando

21 FAC, ¶ 14, Ex. A.

22 The April 25, 2024 Emails enable the Foundation to learn about how the  
23 selected public employees feel about Teamsters Local 1932. Those that are happy  
24 with their union can inform the Foundation using the survey. Those that are not  
happy with Teamsters Local 1932 can utilize the Foundation's optouttoday.com  
website. FAC, Ex. A.

The FAC contains one other allegation of any relevance. In paragraph 45,  
Plaintiffs allege that the April 25, 2024 Emails were “commercial e-mail

1 advertisements” by formulaically reciting this but offering no explanation as to  
2 what way a non-profit’s emails asking about public employees’ opinions on union  
3 membership is in any way “commercial” pursuant to § 17529.5.

4 The FAC contains a slew of other irrelevant allegations intended to bias the  
5 court or reader against the Foundation, while failing to support the underlying cause  
6 of action. These allegations are all subject to the Defendant’s Motion for Rule 11  
7 Sanctions, served on Plaintiffs’ counsel on October 22, 2024, and awaiting the safe-  
8 harbor period. Declaration of Shella Alcabes, (“Alcabes Decl.”) ¶ 4.

### 9 III. LEGAL STANDARD FOR ANTI-SLAPP

10 California’s anti-SLAPP law permits courts to root out baseless lawsuits  
11 aimed at chilling the exercise of free speech—i.e., “strategic lawsuits against public  
12 participation.” In enacting the anti-SLAPP law, the legislature found “a disturbing  
13 increase in lawsuits brought primarily to chill the valid exercise of the constitutional  
14 rights of freedom of speech” and to that end, mandated that the law “shall be  
15 construed broadly.” Cal. Civ. Proc. Code § 425.16(a). Ninth Circuit courts apply the  
16 anti-SLAPP statute in diversity actions like this one. *See Planned Parenthood Fed’n*  
17 *of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018).

18 Courts employ a two-step inquiry to determine if a complaint is subject to a  
19 defendant’s special motion to strike. First, a defendant must make a prima facie case  
20 that a “cause of action against [it] aris[es] from any act of that person in furtherance  
21 of [its] right of petition or free speech under the United States Constitution or the  
22 California constitution in connection with a public issue.” Cal. Civ. Proc. Code §  
23 425.16(b)(1). If that showing is made, the burden shifts to the plaintiff at the second

1 prong of the analysis to “establish[] that there is a probability that the plaintiff will  
2 prevail on the claim.” *Id.*; *In re Outlaw Labs., LP Litig.*, 352 F. Supp. 3d 992, 1010  
3 (S.D. Cal. 2018). If a plaintiff cannot meet its burden on this second step, the Court  
4 should grant the motion to strike. *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 265  
5 (9th Cir. 2013).

6 Where, as here, “a defendant makes a special motion to strike based on alleged  
7 deficiencies in the plaintiff’s complaint, the motion must be treated in the same  
8 manner as a motion under Rule 12(b)(6),” and no discovery is necessary or required  
9 before the Court can rule on Defendants’ anti-SLAPP motion. *Planned Parenthood*,  
10 890 F.3d at 834 (citation omitted). In construing an anti-SLAPP motion under Rule  
11 12(b)(6), courts accept as true the allegations in the complaint, but are not bound to  
12 accept as true a legal conclusion couched as a factual argument, “and a formulaic  
13 recitation of a cause of action’s elements will not do.” *Bell Atl. Corp. v. Twombly*,  
14 550 U.S. 544, 555 (2007).

15 **IV. PLAINTIFFS’ CLAIM IS SUBJECT TO DISMISSAL PURSUANT TO**  
16 **CALIFORNIA’S ANTI-SLAPP STATUTE**

17 **A. Plaintiffs’ Claim Arises from the Foundation’s Exercise of Its Free**  
18 **Speech Rights**

19 Under California’s anti-SLAPP law, causes of action “arising from any act of  
20 [a defendant] in furtherance of the [defendant’s] right of . . . free speech . . . in  
21 connection with a public issue” are subject to a special motion to strike. Cal. Civ.  
22 Proc. Code § 425.16(b)(1). The anti-SLAPP statute is construed broadly, and, to  
23 ensure this, in 1997 the California Legislature added subdivision (e)(4) to protect  
24 “any other conduct in furtherance of the exercise of the constitutional right of

petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (May 12, 1997, Senate Judiciary Committee Analysis at 32.).<sup>4</sup>

Moreover, while SLAPP suits “masquerade as ordinary lawsuits” the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by *large private interests* to deter common citizens from exercising their political or legal rights or to punish them for doing so. *Wilcox v. Superior Ct.*, 27 Cal. App. 4th 809, 816 (1994). Here, this lawsuit masquerades as an anti-SPAM lawsuit brought on behalf of two individuals when in reality, it is brought by Teamsters Local 1932, who contacted their labor law firm, Bush Gottlieb to harass the Foundation for its ardent defense of public employees’ rights, and what the FAC incorrectly describes as a “silent political agenda.” FAC ¶ 14. This point is further discussed in the Foundation’s Rule 11 Motion, to be filed after 21 days of today’s date if Defendants fail to withdraw their complaint.

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<sup>4</sup> It is indisputable that the legislature intended the statute to be extremely broad. “Some courts have failed to understand that this statute covers *any conduct* in furtherance of the constitutional rights of petition and of free speech in connection with a public issue or with any issue of public interest.” (June 23, 1997, Assembly Judiciary Committee Analysis 76 [emphasis added]; Senate Third Reading Analysis 80; see *Sipple v. Foundation For Nat. Progress*, 71 Cal. App. 4th 226, 236 (1999) (“the Senate Judiciary Committee expressly amended section 425.16 to mandate a broad interpretation of the statute in reaction to the over-narrow interpretation of *Zhao v. Wong*.”).

- 1       1. Plaintiffs’ claim falls under Section 425.16 because the April 25, 2024  
2       Emails are conduct in furtherance of the Foundation’s advocacy  
3       concerning issues of public interest.

4       Plaintiffs allege only one act the Foundation engaged in – the April 25, 2024  
5       Email. To determine whether the anti-SLAPP statute applies to this email, the court  
6       must ask two questions. First, are emails “conduct” and second whether the April  
7       25, 2024 Email concerns a “public issue or an issue of public interest?” The answer  
8       to both is resoundingly yes. Emails are considered “conduct” and therefore satisfy  
9       the first question. *Bassi v. Bassi*, 101 Cal. App. 5th 1080, 1098 (2024). Second,  
10      judges have used five interchangeable and overlapping factors to determine whether  
11      something is an issue of public interest. Not each has to be met, but they provide a  
12      general guideline for what could be considered “of public interest.” *Id.*

- 13      1. The statement concerns a person or entity in the public eye;  
14      2. the statement concerns conduct that could directly affect a large number of  
15      people beyond the direct participants;  
16      3. the statement concerns a topic of widespread public interest;  
17      4. the issue is of concern to a substantial number of people; or  
18      5. the issue has been the subject of extensive media coverage. (*Id.*)

19      *Dubac v. Itkoff*, 101 Cal. App. 5th 540, 548–49 (2024). Moreover, “public interest”  
20      also includes activities involving private persons and entities, especially when a  
21      large, powerful organization may impact the lives of many individuals. *Church of*  
22      *Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 650 (1996).

23      There is simply no question that the April 25, 2024 Email, which concerns  
24      union membership and what public employees like or dislike about their union, is of



1 public interest. The FAC itself is full of facts which suggest that the Foundation's  
2 email is related to its advocacy on matters of public concern. Plaintiffs allege that  
3 the Foundation has a "political agenda to encourage union members to 'stop paying  
4 dues' and advising members that they 'have the right to stay in or leave your public  
5 sector union.'" FAC ¶ 14. Plaintiffs also allege that the Foundation has made known  
6 its public position on such matters on its website. *Id.* ¶ 16. Plaintiffs further allege  
7 that the "Foundation holds itself out as 'a battle tank that's battering the entrenched  
8 power of left-wing government union bosses who represent a permanent lobby for  
9 bigger government, higher taxes, and radical social agendas.'" *Id.* Plaintiffs clearly  
10 recognize that the Foundation sent the email in furtherance of its advocacy on  
11 matters of public concern.

12 More broadly, public sector unions are an entity in the public eye, particularly  
13 recently, when unions have participated in anti-Israel protests.<sup>5</sup> In fact, the issue of  
14 union membership and activism has received extensive media coverage even before  
15 this past year, when teachers' unions prevented schools from reopening during the  
16 COVID-19 pandemic.<sup>6</sup>

17 Unions represent over 224,500 California citizens that work for the state,<sup>7</sup> and  
18 all California citizens have an interest in how many public employees are  
19 represented by unions since California citizens pay public employees' salaries. The  
20

21 <sup>5</sup> <https://thehill.com/business/4649705-labor-unions-pro-palestine-protesters/>; last  
22 visited September 19, 2024.

23 <sup>6</sup> [https://www.tabletmag.com/sections/news/articles/how-teachers-union-broke-](https://www.tabletmag.com/sections/news/articles/how-teachers-union-broke-public-education)  
24 [public-education](https://www.tabletmag.com/sections/news/articles/how-teachers-union-broke-public-education); last visited September 19, 2024.

<sup>7</sup> [https://sco.ca.gov/ppsd\\_empinfo\\_demo.html](https://sco.ca.gov/ppsd_empinfo_demo.html); last visited September 19, 2024.



1 Plaintiffs also admit in the FAC that Teamsters Local 1932, the union which is the  
2 subject of the April 25, 2024 Email, represents “approximately 14,000 public  
3 employees in California.” FAC, ¶ 13. Knowing the opinions of public employees’  
4 who are represented by Teamsters reveals how effective or ineffective collective  
5 bargaining and exclusive representation statutes have been, both for Teamsters  
6 members and for the public at large. The FAC is also filed as a class action,  
7 indicating that many individuals may be affected by the April 25, 2024 Email.

8 Lastly, the April 25, 2024 Email was allegedly sent to public employees. FAC,  
9 Ex. A. At the very least, California’s constitution and the First Amendment permit  
10 citizens to petition public employees as their government. *See* U.S. Const. amend. I  
11 (“Congress shall make no law.... abridging.... the right of the people peaceably to  
12 assemble, and to petition the Government for a redress of grievances”); Cal. Const.  
13 art. I, § 3 (“The people have the right to instruct their representatives, petition  
14 government for redress of grievances, and assemble freely to consult for the common  
15 good”). The April 25, 2024 Email is conduct concerning an issue of public interest.

16 **B. Plaintiff Cannot Show a Probability of Prevailing on the Merits of Its**  
17 **Anti-SPAM Claim**

18 Under the second prong of the anti-SLAPP inquiry, the burden shifts to the  
19 plaintiff “to establish a reasonable probability that it will prevail on its claim in order  
20 for that claim to survive dismissal.” *Makaeff*, 715 F.3d at 261. Accordingly,  
21 Plaintiff’s claim must be dismissed if it “presents an insufficient legal basis for [the  
22 claim].” *Id.* Here, Plaintiffs cannot establish that there is a reasonable probability  
23

1 they will prevail on their anti-SPAM claim for two reasons: the April 25, 2024 Email  
2 is not misleading and it is not a commercial email advertisement.

- 3 1. No reasonable person would view the April 25, 2024 Email as misleading  
4 in light of the case law and a common sense reading of the subject line in  
5 the context of the email.

6 Section 17529.5, subdivision (a)(3), makes it unlawful for a commercial e-  
7 mail advertisement to contain “a subject line that a person knows would be likely to  
8 mislead a recipient, acting reasonably under the circumstances, about a material fact  
9 regarding the contents or subject matter of the message.” *Rosolowski v. Guthy-*  
10 *Renker LLC*, 230 Cal. App. 4th 1403, 1416–17 (2014). Courts view an e-mail’s  
11 subject line “in conjunction with the body of the e-mail, rather than in isolation.” *Id.*  
12 at 1418. A subject line is not misleading under the statute if it is not misleading once  
13 read in the context of the email itself. *Id.*

14 a. *No reasonable person would be misled by reading the subject line and*  
15 *email*

- 16 i. The email is clearly not endorsed or solicited by Teamsters

17 Plaintiffs allege that the April 25, 2024 Email is “misrepresentative” because  
18 “the subject line appeared on its face to be endorsed or solicited by the Teamsters,  
19 when in fact the email actually is intended to advertise the Defendant’ website  
20 services in providing instructions and forms for the union member to opt-out of their  
21 membership with the Teamsters.” FAC, ¶ 47. But no reading of the April 25, 2024  
22 Email’s subject line in the context of the email leads to a misunderstanding as to  
23 whether Teamsters endorsed or solicited this email.

1        First, nothing in the subject line indicates that the email is from Teamsters.  
2        “Your Experience with Teamsters – Your Voice Matters” could have been written  
3        by a competing union, by San Bernardino County itself that negotiates all of its labor  
4        contracts with Teamsters, or from fellow San Bernardino County employees who  
5        are considering switching unions. While the subject line does use the word  
6        “Teamsters,” that alone cannot indicate that the email is from Teamsters or endorsed  
7        by Teamsters. By that logic, a political consulting company seeking to survey voters’  
8        attitudes and experiences with the Department of Motor Vehicles (DMV) that sends  
9        an email with the subject line “Your Experience with the DMV – Your Voice  
10       Matters” would be violating Section 17529.5(a)(3). If this court were to hold that the  
11       subject line “Your Experience with Teamsters” is misleading because of the word  
12       “Teamsters,” indicates that the email is from Teamsters or endorsed by them, then  
13       no one but Teamsters could ever send an email about Teamsters with the word  
14       “Teamsters” in the subject line – an impossible result.

15       In fact, had the Foundation failed to include the word “Teamsters” in the  
16       subject line, *that* would have been misleading, since the email is exactly about  
17       Teamsters.

18       Second, the “from” line makes obvious that the email is from  
19       orlando@optouttoday.com and not from a Teamsters email address. In fact, it would  
20       be quite ironic for Teamsters to send an email from a domain name indicating that  
21       the recipient should “opt out” of Teamsters.

22       Third, the email itself makes clear that it is not from Teamsters. “Section  
23       17529.5(a)(3) does not turn on whether a subject line is true or false, taken in the

1 context of the email as a whole or in light of a hyperlinked page. It asks a very  
2 different question: whether the subject line might in fact lead a reasonable person to  
3 expect something materially different than the message's actual content or subject  
4 matter." *Asis Internet Servs. v. Member Source Media, LLC*, 2010 WL 1610066, \*4  
5 (N.D. Cal. Apr. 20, 2010).

6 In looking at the email itself, the first full sentences of the email reads "The  
7 reason why I am reaching out is because several former Teamsters 1932 members  
8 have reached out to us asking for help to stop paying dues in to what they say is a  
9 union that does not really represent them." FAC, Ex. A. Who would the "us" be if  
10 the email was from Teamsters?

11 The first line of the next paragraph clearly states "We here at  
12 OptOutToday.com..." The sender is identifying himself as someone from the  
13 optouttoday website, and so clearly not from Teamsters.

14 The third sentence of the email mentions that union members have a  
15 "constitutional right" to leave their union. Teamsters has no incentive to provide that  
16 information, and any reasonable person would come to that realization. Moreover,  
17 the next sentence of the email once again provides that OptOutToday was the sender  
18 of the email and that they are "dedicated to informing and empowering those that  
19 are disenfranchised by their union." No reasonable person would think that a  
20 message so contrary to Teamsters interests would come from Teamsters.

21 When reading the subject line in the context of the email, it is obvious that it  
22 is not from Teamsters. *See, e.g.*, FAC, Ex. A ("We here at OptOutToday.com are  
23

1 dedicated to informing and empowering those that are disenfranchised by their  
2 union.”)

- 3 ii. The subject line accurately describes the message in the body of  
4 the email

5 Plaintiffs also vaguely alleges that “[t]he subject line of the emails at issue  
6 contained a subject line that was both misrepresentative of the context of the emails’  
7 substance and misleading about a material fact regarding the contents or subject  
8 matter of the message under California Anti-Spam Law.” FAC, ¶ 46. Not only is this  
9 allegation vague as to what exactly is misleading (nothing is stated as to what the  
10 mismatch is between the subject line and the email itself). The subject line “Your  
11 Experience with Teamsters – Your Voice Matters” would lead a reasonable person  
12 to expect an email about the recipient’s experience with Teamsters. That is precisely  
13 the subject matter of the Foundation’s email.

14 The email could be broken down into two parts. The first part, marked “Part  
15 1” below is accurately described by “Your Experience with Teamsters.” The second  
16 part, marked “Part 2” below is accurately described by “Your Voice Matters.” In  
17 fact, had the Foundation not included *both* portions in the April 25, 2024 Email’s  
18 subject line, then the subject line would have been must *less* accurate when viewing  
19 the email as a whole.

20 **Part 1: Your Experience with Teamsters**

21 Dear ,

22 I’ll be quick and to the point.

1 The reason why I am reaching out is because several former Teamsters 1932  
2 members have reached out to us asking for help to stop paying dues into what they  
3 say is a union that does not really represent them. While they just might be  
disgruntled members, it is important to highlight that they chose to exercise their  
constitutional right to do so.

4 We here at OptOutToday.com are dedicated to informing and empowering those that  
5 are disenfranchised by their union. When a union, or any service for that matter, does  
6 not benefit you, why should you then have to cough up your hard-earned paycheck  
7 to them? Thanks to the Janus decision in 2018, you no longer have to and you have  
the right to stay in or leave your public sector union.

8 We are genuinely interested in hearing your side of the story. So, to those that have  
9 decided to opt out - what made you leave? Are there things that Teamsters could  
have done better? Ideally, what are the top 2 things you would like to see change.

10 On the flip side, to those that are still full dues paying members - why do you think  
11 some of your coworkers have left? Are you aware of your right to opt out of dues  
and save you money? What are somethings that Teamsters 1932 has done well?

## 12 **Part 2: Your Voice Matters**

13 If you're open to sharing your thoughts, we'd love to hear from you. Your feedback  
14 is not only important to us but could also be pivotal for many of your peers  
contemplating similar decisions.

15 Please feel free to reach out to us at your convenience or visit OptOutToday.com to  
16 know how you can opt out and start saving hundreds per year.

17 Best,

18 Orlando

19 After reading the subject line in the context of the email, no reasonable person  
20 would be misled.

1           ***b. The April 25, 2024 Email does not come close to what courts consider***  
2           ***is misleading in case law***

3           There is a sufficient body of case law that adjudicates whether an email  
4           subject line was misleading within the meaning of the anti-SPAM statute. The April  
5           25, 2024 Email is nothing like the misleading emails in the caselaw below, and is  
6           therefore not misleading as a matter of law.

7           In the cases below where courts found subject lines to be misleading, they did  
8           so because the subject lines completely did not match the content written in the body  
9           of the email or were deceptive as to what was required in order to obtain the free gift  
10          described in the subject line.

11          In *Tagged, Inc. v. Doe 1 through 10*, 2010 WL 370331 (N.D. Cal. Jan. 25,  
12          2010), the subject line was misleading because the subject line stated, “you have a  
13          message from Tagged,” indicating that there was a message from a friend or  
14          acquaintance trying to get in touch with the plaintiff over the Tagged website. The  
15          text of the email contained messages requesting the recipient click on a link which  
16          would take him to a pornographic website. In *Tagged*, the defendant “intended that  
17          Tagged users rely on his representation that he was a legitimate *Tagged* user,” to  
18          trick people into clicking links. *Id.* In such a context, his other email subject lines  
19          such as “how are u,” and “whassup” reasonably led recipients to believe that the  
20          emails were personal messages as opposed to “unsolicited commercial messages  
21          with links to an adult dating website.” *Id.* at \*6. The body of the emails did not  
22          illuminate the reality of what the embedded links would direct recipients to. *Id.* at  
23          \*2. Examples of the contents of email bodies included “you look cool! I have some  
24          new pics of me too would love if u could check and rate them,” and “what’s up;)”



1 you sure look naughty [sic]! I have some new pics of me too would love it you  
2 could check and rate them.” *Id* (internal quotation marks omitted). The court thus  
3 found that the email subject lines violated Section 17529.5. *Id.* at \*7.

4 In *Asis*, 2010 WL 1610066, at \*5, the subject line was misleading because the  
5 emails stated “Wal\*Mart 500 Dollar Gift Card Inside,” Second Attempt: \$500 Target  
6 Gift Card Inside,” and “Second Attempt: Victoria's Secret Gift Card Inside,”  
7 intending to have the recipients open the e-mails by enticing them with free gifts.  
8 The emails, however, did not actually contain free gifts or gift cards. Again, body of  
9 the email was a direct contradiction of the subject line and therefore misleading  
10 under the statute. *Id.*

11 In *Asis Internet Servs. v. Consumerbargaingiveaways, LLC*, 622 F. Supp. 2d  
12 935, 937 (N.D. Cal. Apr. 17, 2009), the subject lines contained statements like “Your  
13 JCPenny 500 USD Gift Card!”; or “CONFIRMATION: We have your \$100 Visa  
14 Gift Card ready to ship!”; or “[QUAR] You were chosen to receive a \$500 JCPenney  
15 Gift Card!”; or “[QUAR] Your \$500 JC Penney Holiday Gift Card Expiring Soon.”  
16 In fact, the gifts were not free because the recipient had to, for example, make a  
17 purchase or open a new credit card in order to receive them. The actual requirements  
18 for participation were buried at the end of the email or on a separate internet page  
19 accessible only after the recipient provided certain personal information. Moreover,  
20 the email headers concealed or misrepresented who the messages were actually  
21 from. *Id.* As such, a reasonable person could be misled by the subject lines in light  
22 of the body of the emails.



1 In *Hypertouch, Inc. v. ValueClick, Inc.*, 192 Cal. App. 4th 805, 837-38 (2nd  
2 Dist. 2011), the subject line was misleading because it stated “Get a FREE Golf  
3 Retreat . . .”; “Let us know your opinion and win a free gift card”; “which would  
4 you choose? Win a free gift card for letting us know.” The body of the emails  
5 contained a link to a promotional website that required purchases, rather than doing  
6 a survey, to obtain a free gift card. The court explained that “[i]f a subject line creates  
7 the impression that the content of the e-mail will allow the recipient to obtain a free  
8 gift by doing one act (such as opening the e-mail or participating in a single survey),  
9 and the content of the e-mail reveal that the ‘gift’ can only be obtained by  
10 undertaking more onerous tasks (such as paying money for the gift or agreeing to  
11 partake in other offers), the subject line is misleading about the contents of the e-  
12 mail.” *Id.* at 838.

13 In *Rosolowski v. Zoosk, Inc.*, 2013 WL 974547 (Oct. 17, 2013), the subject  
14 line was misleading because it stated, “someone really wants to meet you”; “meet  
15 me on Zoosk”; “be my valentine.” The body of the emails contained commercial  
16 advertising unrelated to any personal communications. A subject line that is  
17 unrelated to the content of the email, such as the subject lines in *Rosolowski*, is  
18 misleading under the statute.

19 Further, in the two cases where the courts found that emails *were not*  
20 misleading as a matter of law, the subject lines were far more ambiguous than the  
21 instant case. In *Rosolowski*, 230 Cal. App. 4th at 1416–17, the subject line offered  
22 “free” or “complimentary” gifts, but the body email made clear that the free gift was  
23 conditional upon a purchase. This was not misleading because the court viewed the

1 “email’s subject line in conjunction with the body of the e-mail, rather than in  
2 isolation.” *Id.* As such, the court concluded the subject lines’ offers of free gifts were  
3 not likely to mislead a recipient, acting reasonably under the circumstances, because  
4 the email body itself made it clear that a free gift was conditional upon a purchase.  
5 *Id.*

6 Similarly, in *Bontrager v. Showmark Media LLC*, 2014 WL 12600201 (C.D.  
7 Cal. June 20, 2014), the subject line stated “Lawyer Media, Top Lawyers in  
8 California” with body email advertising a Top Lawyer Recognition plaque. *Id.* at \*  
9 3. Although the plaintiff believed the email was an announcement of an award or  
10 recognition for him, the subject was not objectively misleading because the email  
11 did not assert anywhere that the recipient of the email himself won the top lawyer  
12 award. *Id.* at \* 4.

13 Here, as April 25, 2024 Email shows, the subject line addressed exactly what  
14 was in the body of the email and was clearly not from Teamsters.

15 2. The April 25, 2024 Email is not a commercial email advertisement because  
16 the Foundation is informing employees of their First Amendment rights  
and offering opt-out assistance free of charge.

17 To be liable under Section 17529.5(a)(3), the defendant must send a  
18 “commercial e-mail advertisement” where the subject line “would be likely to  
19 mislead a recipient, acting reasonably under the circumstances, about a material fact  
20 regarding the contents or subject matter of the message.” Section 17529.1(c) defines  
21 “commercial e-mail advertisement” as “any electronic mail message initiated for the  
22 purpose of advertising or promoting the lease, sale, rental, gift offer, or other  
23

1 disposition of any property, goods, services, or extension of credit.” The word  
2 “commercial,” however, is not defined in the statute.

3 Plaintiffs’ claim fails for three reasons. First, Plaintiffs fail to sufficiently  
4 allege that the April 25, 2024 Email was a “commercial email advertisement.”  
5 Second, in reading the April 25, 2024 Email, it is clear that it does not offer anything  
6 “commercial.” An email from the Foundation, a non-profit, surveying public  
7 employees about their experience as union members and offering to assist in  
8 resigning their union membership is not “commercial” in nature. Third, the  
9 Foundation does not engage in “commerce” when informing employees of their  
10 First Amendment rights.

11 As to the first point, Plaintiffs have only one allegation to satisfy the  
12 “commercial email advertisement” element of Section 17529.5. In paragraph 45,  
13 Plaintiffs allege that the April 25, 2024 Emails were

14 ““commercial e-mail advertisements’ within the meaning  
15 of § 17529.1(c), intending to advertise the services of  
16 Defendant in providing assistance to union members in  
17 terminating their memberships by hosting a website  
18 which: (1) collects contact information and other data  
19 about the member; and (2) provides the member with opt-  
out instructions and customized opt-out forms for specific  
public-sector unions, which the member can either print or  
have Defendant mail to them.” FAC, ¶ 45.

20 Even under the liberal pleading standard of Rule 8(a)(2), a plaintiff must  
21 provide more than mere labels, conclusions, and formulaic recitations of the claim’s  
22 requisite elements. *Bell Atl. Corp.*, 550 U.S. at 555. Here, Plaintiffs fail to allege  
23 how or in what way the April 25, 2024 Email is a “commercial email advertisement.”

1 Plaintiffs simply cite the language of Section 17529.5 verbatim and make the  
2 circular claim that the email is a “commercial email advertisement” because it is a  
3 commercial email advertisement pursuant to the statute.

4 Even if Plaintiffs were to allege that the “service” the Foundation provides is  
5 “providing assistance to union members in terminating their memberships” by  
6 providing opt-out instructions and opt-out forms, the Foundation receives no  
7 commercial benefit from this. The term “service” in Section 17529.1(c) does not  
8 mean the offer of any service whatsoever. For example, an email that promotes a  
9 church service during Christmas or a free charity service of driving the elderly to  
10 their doctor’s appointments would obviously not fall under the anti-SPAM statute  
11 but this “service” has no exchange as part of it. Because the Foundation does not  
12 receive anything from a union member if they opt out of union membership, the  
13 optouttoday.com website is not a commercial “service” under the statute. Ibarra  
14 Decl. ¶ 6.

15 As to the second point, because the word “commercial” is not defined in the  
16 statute, courts may “first examine the statutory language, giving it a plain and  
17 commonsense meaning.” *Coal. of Concerned Cmty’s, Inc. v. City of Los Angeles*, 34  
18 Cal.4th 733, 737 (2004). The meaning of a statute’s terms may also be determined  
19 by consulting a dictionary. *See, e.g., People v. Farell*, 28 Cal.4th 381, 387-388  
20 (2002).

21 In looking at dictionary definitions, the commonsense understanding accords  
22 with dictionary definitions and other legal sources. According to Webster’s 3d New  
23 Int’l. Dictionary (2002) p. 456, “commercial” means “occupied with or engaged in

1 commerce” and “commerce” means “the exchange or buying and selling of  
2 commodities esp. on a large scale.” The Oxford English Reference Dictionary (2d  
3 ed. 1996) p. 290 defines “commerce” as “financial transactions, esp. the buying and  
4 selling of merchandise, on a large scale,” and Black’s Law Dictionary (10th ed.  
5 2014) p. 325 defines “commercial” as “[o]f, relating to, or involving the buying and  
6 selling of goods; mercantile.”

7 The April 25, 2024 Email does not involve the “advertising or promoting the  
8 lease, sale, rental, gift offer, or other disposition of any property, goods, services, or  
9 extension of credit.” Cal. Bus. & Prof. Code § 17529.1(c). The April 25, 2024  
10 Email’s purpose is to survey Teamsters members to learn about their experience with  
11 Teamsters. At best, the only “service” that is offered is a link to optouttoday.com,  
12 and this, in turn, is not commercial or financial in any way. The optouttoday.com  
13 website offers public employees an opportunity to opt out of union membership, if  
14 they so choose. Ibarra Decl. ¶ 7. This “service” is entirely free, does not benefit the  
15 Foundation financially in any way and does not involve “buying and selling of  
16 goods.” *Id.* at 8. Therefore, informing public employees about their rights has  
17 nothing to do with any commercial transactions.

18 Lastly, the Foundation’s “service” of assisting individuals in opting out of  
19 union membership is done for free and without any *quid pro quo*, and the Foundation  
20 is a non-profit that does not benefit financially from informing public employees of  
21 their First Amendment Rights. Ibarra Decl. ¶ 9. Moreover, looking at the case law  
22 on the anti-SPAM statute, there is not a single case of a non-profit sending emails  
23 about their “service,” nor is there any case where the good or service was non-

1 commercial in nature. As such, the April 25, 2024 Email cannot be construed as  
2 offering “a service,” and is in no way commercial in nature. The anti-SPAM statute  
3 does not apply.

4 **V. CONCLUSION**

5 Plaintiffs cannot state a claim for the anti-SPAM statute as a matter of law  
6 because the April 25, 2024 Email is neither misleading nor a commercial email  
7 advertisement. Accordingly, the Court should strike and dismiss the Plaintiffs’ First  
8 Amended Complaint with prejudice, and award attorneys’ fees and costs to the  
9 Foundation pursuant to California’s anti-SLAPP law’s mandatory attorneys’ fees  
10 clause for prevailing defendants.

11  
12 Respectfully Submitted,

13 Dated: October 22, 2024

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